

CHEAH BOON TAT*a***v.****PUBLIC PROSECUTOR**

COURT OF APPEAL, KUALA LUMPUR
DATUK SHAIK DAUD BIN HJ. ISMAIL JCA
DATO' SITI NORMA YAAKOB JCA
DATO' ABU MANSOR BIN ALI JCA
[CIVIL APPEAL NO. K-05-51-1995]
6 JULY 1995

b

CRIMINAL PROCEDURE: *Trial by jury - Abolishment - Act A908 - Position of transitional cases - Whether to continue to be tried with the aid of jury - Whether caught by the Amendment - Section 39 of Act A908 - Whether a saving clause - Import thereof.*

c

CRIMINAL PROCEDURE: *Trial - Charge of murder - Preliminary inquiry - Committal to High Court - Whether preliminary inquiry before Magistrate and trial before High Court Judge constituted one continuous process of hearing - Penal Code s. 302 - Criminal Procedure Code Chapters XVII, XXII.*

d

The appellant was charged with murder under s. 302 Penal Code read with s. 34 thereof. Following a preliminary inquiry held before the learned Magistrate the appellant was committed to stand trial before the High Court on the same charge, and thereafter, stood poised to be tried before that Court with the aid of a jury, sometime in May 1995, pursuant to the provisions of Chapter XXII of the Criminal Procedure Code. However, before the said trial could begin, on 17 February 1995, the Criminal Procedure Code (Amendment) Act 1995 or Act A908 came into force and with that came the abolishment of jury trials in this country. The Amendment notwithstanding, the appellant insisted on a trial by jury and argued before the High Court that he was entitled to such mode of trial as the Amendment had no retrospective effect, and that it did not apply to transitional cases. He also argued that the Amendment, by s. 39 therein, had provided a saving clause which, upon its true construction, had saved him from the effect of the Amendment. The learned Judicial Commissioner however took a different view and in consequence ordered that the trial be proceeded with without a jury. Hence this appeal by the appellant.

*e**f*

Before the learned Court of Appeal Judges herein the primary issue that arose was whether s. 39 aforesaid had in fact saved the appellant from the Amendment, as to entitle him, despite the Amendment, to a trial by jury.

*g***Held:**

Per Shaik Daud bin Hj. Ismail JCA (delivering the judgment of the Court):

[1] The trial herein is one continuous process beginning from the preliminary inquiry right up to the verdict of the jury in the High Court. They are not separate proceedings and the evidence adduced at the preliminary inquiry ought to be taken as the beginning of the trial. In the light of this s. 39(2) of the Amendment is appropriately applicable.

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[2] Section 39 of the Amendment is a saving clause and is specifically meant to cater for cases which are still in the course of hearing when the Amendment came into effect. Preliminary inquiries, even when they are still in progress, are saved by the section, let alone those which had already been concluded and committed to the High Court.

i

- a* [3] In the circumstances the appellant is entitled to be tried by a jury as that entitlement had accrued to him way back before the Amendment since he was already committed to the High Court long before the effective date of the coming into force of the Amendment. Section 39 has in fact saved him from the Amendment.

[Appeal allowed. Appellant ordered to be tried before a jury].

- b* **[Bahasa Malaysia Translation of Headnotes]**

PROSEDUR JENAYAH: *Perbicaraan melalui juri - Penghapusan - Akta A908 - Kedudukan kes-kes peralihan - Samada harus terus dibicarakan dengan bantuan juri - Samada tertakluk oleh Pindaan - Seksyen 39 Akta A908 - Samada fasal penyelamat - Kesan.*

- c* **PROSEDUR JENAYAH:** *Perbicaraan - Tuduhan membunuh - Siasatan awal - Komital ke Mahkamah Tinggi - Samada siasatan awal di hadapan Majistret dan perbicaraan di hadapan Hakim Mahkamah Tinggi satu proses perbicaraan yang bersambungan - Kanun Keseksaan s. 302 - Kanun Prosedur Jenayah. Bab XVII, XXII.*

- d* Perayu telah dituduh membunuh di bawah s. 302 Kanun Keseksaan di baca bersama s. 34. Berikutan satu siasatan awal di hadapan Tuan Majistret yang bijaksana perayu telah diperintah untuk dibicarakan di hadapan Mahkamah Tinggi atas tuduhan yang sama, dan selepas itu, bersedia untuk dibicarakan di hadapan Mahkamah itu dengan bantuan juri, pada bulan Mei 1995, selaras dengan peruntukan Bab XXII Kanun Prosedur Jenayah. Bagaimanapun, sebelum perbicaraan itu dapat dimulakan, pada 17 Februari 1995, Akta Kanun Prosedur Jenayah (Pindaan) 1995 atau Akta A908 dikuatkuasakan dan berikutnya, perbicaraan dengan juri dalam negeri ini telah dihapuskan. Tanpa menghiraukan Pindaan tersebut, perayu berkeras mahukan perbicaraan dengan juri dan berhujah di hadapan Mahkamah Tinggi bahawa beliau berhak kepada cara perbicaraan sedemikian oleh kerana Pindaan tersebut tidak mempunyai kesan kebelakangan, dan bahawa ianya tidak terpakai kepada kes-kes peralihan. Beliau juga berhujah, bahawa Pindaan tersebut, melalui s. 39 di dalamnya, telah memperuntukkan fasal penyelamat yang mana, setelah pentafsirannya yang sebenar, telah menyelamatkan beliau daripada kesan Pindaan tersebut. Pesuruhjaya Kehakiman yang bijaksana walaubagaimanapun telah melihatnya dengan pendapat yang berlainan dan akibat dari itu memerintahkan supaya perbicaraan itu diteruskan tanpa juri. Dengan itu, wujudlah rayuan ini oleh perayu.
- e*
- f*

- g* Di hadapan Hakim-hakim Mahkamah Rayuan di sini isu utama yang berbangkit adalah samada s. 39 di atas telah menyelamatkan perayu daripada Pindaan tersebut, bagi memberinya hak, walaupun terdapat Pindaan tersebut, untuk dibicarakan dengan juri.

Diputuskan:

Oleh Shaik Daud bin Hj. Ismail HMR (menyampaikan keputusan Mahkamah):

- h* [1] Perbicaraan di sini adalah satu proses yang berterusan bermula daripada siasatan permulaan sehingga kepada keputusan juri dalam Mahkamah Tinggi. Proses ini tidak merupakan prosiding-prosiding yang berasingan dan keterangan yang dikemukakan di siasatan awal seharusnya dianggapkan sebagai permulaan perbicaraan. Memandangkan perkara ini, s. 39(2) Pindaan secara wajarnya adalah terpakai.

- i* [2] Seksyen 39 Pindaan adalah fasal penyelamat dan adalah secara khususnya bermaksud untuk digunakan bagi kes-kes yang mana masih berada dalam peringkat perbicaraan bilamana Pindaan tersebut berkuatkuasa. Siasatan-siasatan permulaan, walaupun masih dalam perbicaraan siasatan, diselamatkan oleh seksyen tersebut, apalagi kes-kes yang telah pun ditamatkan dan dihantarbicara ke Mahkamah Tinggi.

[3] Dalam keadaan tersebut perayu adalah berhak untuk dibicarakan dengan juri kerana hak itu telah terakru kepadanya jauh sebelum Pindaan tersebut oleh kerana beliau telah pun dihantarbicara ke Mahkamah Tinggi jauh sebelum tarikh penguatkuasaan Pindaan tersebut. Seksyen 39 telah menyelamatkannya daripada Pindaan tersebut.

[Rayuan dibenarkan. Perayu diperintahkan untuk dibicarakan di hadapan juri].

Case referred to:

Savrimuthu v. PP [1987] 2 MLJ 173 (dist)

Legislation referred to:

Criminal Procedure Code (Amendment) Act 1955 or Act A908, s. 39(l), (2)

For the appellant - Karpal Singh (Jagdeep Singh Deo with him); M/s. Karpal Singh & Co.

For the respondent - Zaitun Zawiyah bt. Puteh (Mohd. Yusof b. Hj. Zainal Abiden with her); Senior Federal Counsel.

JUDGMENT

Shaik Daud bin Hj. Ismail JCA:

The appellant was charged before the Magistrate in Sungai Petani for an offence punishable under s. 302 read with s. 34 of the Penal Code. Pursuant to Chapter XVII of the Criminal Procedure Code the learned Magistrate proceeded to hold a preliminary inquiry and at the end of which the learned Magistrate framed a charge similarly for an offence punishable under s. 302 to be read with s. 34 of the Penal Code and accordingly committed the appellant on 24 April 1994 to stand trial in the High Court at Alor Setar.

On 6 July 1994 the learned Magistrate forwarded the records of the preliminary inquiry to the High Court at Alor Setar as well as to the Deputy Public Prosecutor as required under s. 147 of the Criminal Procedure Code (CPC). It is pertinent to state at this stage that under s. 252 of the CPC a person committed for trial shall be tried in the High Court as soon as practicable.

The trial in the High Court was not fixed until almost a year later i.e. on 6 April 1995 It was fixed for hearing as follows:

May - 24, 25, 27 to 30;

June - 4 to 8 and 10 to 15.

and notices of the above hearing dates were accordingly sent to all parties.

Now, at the time the appellant was committed for trial in the High Court at Alor Setar and at the time the record referred to under s. 147 CPC were submitted to the High Court and to the Deputy Public Prosecutor, the mode of trying the offence with which the appellant was charged is set out in Chapter XXII of the CPC i.e. he ought to have been tried with the aid of a jury. However, before the proceedings in the High Court began, the Criminal Procedure Code (Amendment) Act 1995 or Act A908 was passed by Parliament and came into effect from 17 February 1995. In short Act A908 did away with preliminary inquiries, trials by jury and trials by assessors with effect from that date. Henceforth such trials shall be before a single Judge sitting alone. The Amendment has therefore abolished jury trials for offences of murder.

Following from this the Alor Setar High Court purported to begin the trial of the appellant on 24 May 1995 without a jury. This immediately prompted Mr. Karpal Singh Counsel for the appellant to object on the ground that in the circumstances of the case, the

- a* appellant is entitled to be tried by a jury as the amendment to the CPC ought not to be construed retrospectively. He further contends that s. 39 of Act A908 provided for a saving of cases of this nature. Naturally the Deputy Public Prosecutor disagreed and urged upon the Court to proceed with the trial without a jury as he opined that Act A908 has no application as s. 39 only applies to cases that were part heard on the effective date. He adds further that the trial of the appellant has not begun in the High Court and therefore
- b* s. 39 is not applicable. In view of these contrary opinions, it is therefore necessary to examine s. 39 of Act A 908 which provides:

39.(1) Any preliminary inquiry, trial by Jury or trial with the aid of assessors that has been commenced before or on the commencement of this Act shall be continued or concluded in all respects as if this Act had not been passed.

- c* (2) For the purpose of subsection (1), any preliminary inquiry or trial has been commenced when the accused has appeared before or has been brought before the Magistrate's Court or the High Court, as the case maybe, and evidence has begun to be adduced in the inquiry or trial.

Pursuant to this section the Chief Registrar of the Federal Court as directed by the Chief Justice of that Court issued a "Pekeliling Ketua Pendaftar Bil. 2/1995 dated 1 May 1995 as follows:

- d* **Pekeliling Ketua Pendaftar Bil. 2/1995**
Siasatan Permulaan (Preliminary Enquiry) dan **Perbicaraan dengan Juri/Pengapit (Assessors).**

Akta A908, berkuatkuasa pada 17 Februari 1995 telah membatalkan siasatan permulaan dan perbicaraan dengan juri/pengapit.

- e* 2. Adalah saya di arah oleh Y.A.A. Ketua Hakim Negara bahawa semua siasatan permulaan sebelum 18 Februari 1995, yang telah dimulakan dimana keterangan-keterangan telahpun dirakamkan hendaklah diteruskan sehingga ditamatkan.

- f* 3. Bagi kes-kes yang sedang dibicarakan di Mahkamah Tinggi dengan juri/pengapit, dan bagi kes-kes yang dikemukakan ke Mahkamah Tinggi melalui siasatan permulaan hendaklah diteruskan perbicaraannya dengan juri/pengapit sehingga tamat.

After hearing submissions from both sides the learned Judicial Commissioner was of the view that in the circumstances of the case, the appellant is not entitled to be tried by a jury and accordingly dismissed the preliminary objection and ordered the appellant to be tried without jury.

- g* At the appeal before us the same issues were raised by Mr. Karpal Singh on behalf of the appellant and Senior Federal Counsel Puan Zaitun Zawiyah bt. Puteh on behalf of the respondent. After having heard submissions from both sides on 3 July 1995 and in view of the important nature of the matter we adjourned to deliberate and on 5 July 1995 handed down our decision.

- h* We are of the view that unlike Singapore which also abolished jury trials, our amending Act A908 specifically provided a saving clause for transitional cases, in s. 39 of the Act.

- i* On our reading of this section it seems clear to us that s. 39(1) and (2) is just that i.e. a saving section. It is specifically meant to cater for cases in the course of hearing. In the circumstances of the present case there is, therefore, no need to look anywhere else for the answer as to whether this case ought to be tried by a jury as the answer is in s. 39 itself. Preliminary inquiries in progress are saved by s. 39 a *fortiori* in cases which have been concluded and committed to the High Court. As to the issue of when a trial

is said to begin the case cited i.e. *Savrimuthu v. PP* [1987] 2 MLJ 173; in our opinion is no authority as that case is not a case involving a preliminary inquiry and the trial of a capital offence.

In trials of this nature the situation is different and the process of trial is one continuous one from the preliminary inquiry right up to the verdict of the jury in the High Court. They are not separate proceedings because a trial by jury in the High Court cannot be proceeded with without a preliminary inquiry having been concluded first. Therefore this is one process and evidence adduced at the preliminary inquiry is to be reckoned as the beginning of the trial. In the light of this s. 39(2) is appropriately applicable. The Chief Registrar's Circular dated 1 May 1995 though it has no force of law is in line with s. 39(1) and (2). Therefore we conclude that in the circumstances of this case the appellant herein is entitled to be tried by a jury as that entitlement had accrued to him way back before the Amendment since he was already committed to the High Court long before the effective date of the coming into force of the Amendment. The fact that the proceedings in the High Court did not commence earlier is no fault of his. While we appreciate the desire to abolish jury trials, we are also mindful of the fact that s. 39 was specifically provided to cater for cases of this nature. We are unanimously of the view that the appellant here is entitled to be tried by a jury as s. 39 has in fact saved him from the Amendment.

Appeal is hereby allowed and the learned Judicial Commissioner's order is set aside. Case is remitted back to the High Court to be tried before a jury.

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